SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1970.

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ERNEST A. ARMSTRONG,

Petitioner,

v.

COMMERCE TANKERS CORP. and EMPIRE SHIP AGENTS & BROKERS CORP.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1970

(4479)

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COMMERCE TANKERS CORP. and EMPIRE SHIP AGENTS & BROKERS CORP.,

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Petition For Writ of Certiorari to The United States Court of Appeals For the Second Circuit.

Petitioner, Ernest A. Armstrong, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York, entered in favor of the respondents, after the trial judge set aside a jury verdict in favor of the Petitioner granted Respondents' motion for a directed verdict and granted judgment N.O.V. for Respondents.

The Opinion of the Courts Below.

The opinion of the United States District Court for the Southern District of New York by Judge Richard H. Levet is reported in 311 F. Supp. 1236 and appended hereto (App. pp. 9-21). The opinion of the United States Court of Appeals for the Second Circuit by Judge Robert P. Anderson is reported in 423 F. 2d 957 and is appended hereto (App. pp. 22-26).

Jurisdiction.

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was decided and entered May 14, 1970 and is appended hereto (App. pp. 27-28).

Petitioner's time for filing a petition for writ of certiorari in this case was extended to and including August 17, 1970 by the order of Mr. Justice John M. Harlan dated May 27, 1970 and is appended hereto (App. p. 29).

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U. S. C. Sections 1254(1) and 2101(c).

Questions Presented for Review.

In a Jones Act personal injury action based solely on the Plaintiff Seaman's own testimony:

(1) Is circumstantial evidence of negligence sufficient, or must his case be supported by evidence of negligence from one who was present at the time of the occurrence?

(2) May a jury infer that the conduct of a fellow crewman was negligent and the causative factor in plaintiff's injury where the circumstantial evidence clearly supports such inferences?

(3) May a District Judge set aside a jury verdict for the seaman and grant judgment N.O.V. for the shipowner, thus depriving him of his constitutional right to a jury trial, where the circumstantial evidence clearly supports inferences of negligence and causation?

Statutes Involved.

The Jones Act, 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U. S. C. 688, 46 U. S. C. A. 688. The Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. 51; 45 U. S. C. A. 51.

The pertinent part of the Jones Act, 46 U. S. C. A. 688, reads:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *"

The pertinent part of the Federal Employers' Liability Act, 45 U. S. C. A. 51, provides that the employer shall be liable:

> "* * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. * * *"

Statement of the Case.

The United States District Court below acquired jurisdiction as petitioner's suit is based on the Jones Act, 46 U. S. C. A. 688. The pre-trial order charged that Respondent Commerce was negligent in that one of its employees negligently slammed a bunkroom door while Petitioner's thumb was in it. The issue of liability was tried first; at the end of Petitioner's case Respondents rested and moved to dismiss and for a directed verdict. The Court reserved decision on both motions and submitted the cause to the jury on a special verdict on written interrogatories. The jury found that Petitioner's

injury was proximately caused by the negligence of a coemployee; that unseaworthiness had not been proved and that Petitioner was not contributorily negligent. After the trial of the damage issue the District Judge denied Respondents' motion to set aside the verdict for excessiveness, granted their motion for a directed verdict and granted them judgment N.O.V. The United States Court of Appeals for the Second Circuit affirmed.

Respondent Commerce employed the crew of its S/S Thalia including Petitioner, an able-bodied seaman. After working approximately six hours during the preceding eight hours, Petitioner, off duty, at about 8 A. M. on April 20, on invitation and for relaxation entered the bunkroom or quarters of Darcy, a fellow crewman. There were present: petitioner, a white-haired wiper, a machinist and Darcy, all were members of the crew; conversation ensued. The wiper was talking about flying a plane and stated that he wanted to be a pilot: Petitioner said, "Well, why don't you do it?" The wiper took offense at the remark. Petitioner, who had been sitting at a bunk near a door which was to his left and inside the room, got up to leave as he didn't want any trouble; as he turned to his left toward the door Darcy put his hand on petitioner's shoulder and said, "Yes, you better go." Petitioner then lost his balance; he was still inside the room and about 2½ feet from the door sill; he reached out with his left hand to regain his balance and grabbed the door jamb with his thumb entering the open space between the door jamb and the hinged edge of the door. The door then slammed with force crushing his thumb. Darcy was directly behind Petitioner, a little to his left and within one stride of the edge of the door when he put his hand on Petitioner's shoulder.

The door was fully open immediately prior to accident: it had not moved during the one-half hour Peti-

tioner was in the room; the vessel was at anchor at Singapore and there were only slight swells. The door was the usual bunkroom door without a check to slow it down when it closed. Petitioner did not make any contact with the door. The only persons in the room when the door slammed were the wiper and Darey. Petitioner could not see who slammed the door, for when his thumb was in the open space between the door jamb and the hinged edge of the door he was facing the "other way" or the passageway; but he then knew that "Darey was right behind" him and "within one stride of the edge of the door".

On the proof the only force that could have slammed the door was human intervention inside the room. As the jury absolved Petitioner, there remained inside the room only the co-employees Darey and the wiper as causes; the jury properly concluded that one of them did it when Petitioner was exposed to injury from a slamming door.

Reasons for Allowance of the Writ.

The decision of the Courts below imposes a new, more onerous and exacting standard of burden of proof in Jones Act cases, which is in conflict, on the basis of fact and law, with the decisions of this Court and other United States Courts of Appeal. If left standing it will adversely affect the Jones Act rights of seamen.

Relying entirely on general negligence cases and Prosser Torts, in granting judgment N.O.V. for Respondents, the District Judge fashioned a new rule of burden of proof in seamen's cases, holding that the seaman must prove that his employer's negligence was a basis "'for all reasonably probable causes to which the accident should be attributed'" (App. p. 14), and that the negligence was "'a substantial factor in bringing

about the result'" (App. p. 15). The proof limited the "choice of probabilities" to the narrow issue of who slammed the door. When the jury exonerated the Petitioner of any negligence, it was compelled to find that either Darcy or the wiper did it and "choice of probabilities" was removed from the case. The rule promulgated by the District Judge and left undisturbed by the Court of Appeals is in direct conflict with a long line of decisions of this Court, in Jones Act and *FELA* cases, holding that it is not necessary for the proof to exclude all causes but the negligence of the employer, that it is sufficient if employer negligence is established as one of the possible causes. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35; *Lavender v. Kurn*, 327 U. S. 645, 653; *Schultz v. Pennsylvania Railroad Co.*, 350 U. S. 523; *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 506; *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521; *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U. S. 108, 114.

Solely on a factual recital, without citing a single Jones Act or *FELA* case, the Court of Appeals affirmed on the ground that, "* * * there was no fact shown from which an act of negligence could be inferred" (App. p. 25).

The District Judge made much of the fact that neither Darcy nor the wiper were called by the Petitioner in support of his case (App. pp. 19, 20). Petitioner was not required to prove his case by direct evidence, for "Circumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, 330; *Rogers v. Missouri Pacific R. R. Co. (supra)*, at page 508; *Johnson v. U. S.*, 333 U. S. 46, 48; *Long v. Union Pacific R. Co.* (C. A. 10), 192 F. 2d 788, 790; *Olsen v. States Line* (C. A. 9), 378 F. 2d 217, 220; *Ofmani v. Nederlandsch-Amerikaansche-Stoomv. Matt* (C. A. 2),

410 F. 2d 78, 81. *Long (supra)* is squarely in point, for it rests solely on the permissible jury inference that one or two co-employees Long saw near a bunker door, "just prior to the accident * * *" caused it to fall and strike him; both co-employees were present at the trial but were not called. Even if Darey and the wiper had testified that they did not slam the door, Petitioner's testimony alone, would still have raised an issue of fact for jury determination. *Socony Vacuum Oil Co. v. Smith*, 305 U. S. 424, 427.

Not only was the jury permitted to infer that either Darey or the wiper slammed the door, it was permitted to conclude that such conduct was negligent. *Johnson v. U. S.* (at p. 48, 49, *supra*); *Long v. Union Pacific R. Co.* (at p. 790, *supra*). A door is an instrumentality which may cause injury by slamming. *Howarth v. U. S. Shipping Board Emergency F. Corp.* (C. A. 2), 24 F. 2d 374; *McCormick Shipping Corp. v. Strait* (C. A. 5), 322 F. 2d 648; *States Steamship Co. v. Berglund* (C. A. 9), 41 F. 2d 456. An employee who fails to exercise reasonable care in handling a door when a co-employee is within range of injury from it, is negligent. *States Steamship Co. v. Berglund (supra)*; *Long v. Union Pacific R. Co. (supra)*. Petitioner's case is strikingly similar to that of *Johnson v. U. S.* (at p. 50, *supra*), where this Court held that solely on the basis of Johnson's testimony the trial court was entitled to infer that his co-employee working above him was negligent in dropping a block on him, "* * * for human experience tells us that careful men do not customarily do such an act." So a careful employee does not slam a door when his fellow employee is not clear of it and vulnerable to injury. In *Johnson* (at p. 49, *supra*) this Court held that the rule of *res ipsa loquitur* was applicable, for "No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked." Peti-

tioner's case was tried as the pre-trial order alleged on the ground that a co-employee was negligent in slamming the door when Petitioner was not clear of it. Petitioner proved that negligence by jury determination and it makes no difference that he did not label his cause, one of *res ipsa loquitur*, *Ofmani v. Nederlandsch-Amerikaansche Stoomv. Matt* (at p. 82, *supra*).

The test of a Jones Act jury case is not substantial negligence as the District Judge proclaimed (App. p. 15) but any negligence no matter how slight which is a causative factor, *Ferguson v. Moore-McCormack Lines, Inc.* (at page 523, *supra*). Yet, the Court of Appeals refused to even consider the scope of permissible inferences the jury was entitled to make, usurped its function and deprived Petitioner of his Constitutional right to a jury trial which is an integral and vital part of his remedy under the Jones Act. *Jacob v. City of New York*, 315 U. S. 752, 757, 758; *Lavender v. Kurn* (at pages 652, 653, *supra*).

CONCLUSION.

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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APPENDIX.

Opinion by the United States District Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ERNEST A. ARMSTRONG,

Plaintiff,

against

COMMERCE TANKERS CORP. and EMPIRE SHIP AGENTS & BROKERS CORP.,

Defendants.

67 Civ. 2274

Appearances:

Paul C. Matthews, Attorney for Plaintiff.

Hill, Betts, Yamaoka, Freehill & Longcope, Attorneys for Defendants.

LEVET, D. J.:

This is a motion for judgment N.O.V. for defendants after a Special Verdict holding defendants liable to plaintiff for negligence in a seaman's action for personal injuries. A copy of the Special Verdict is hereto annexed. Under Rule 42B, liability was tried first.

Also, at the conclusion of the trial on damages in the above-entitled action (1) plaintiff moved to set aside the verdict as inadequate; and (2) defendants moved to set aside the same verdict as excessive and as inconsistent. Subsequently, the plaintiff withdrew his motion.

In the pretrial order (p. 1) the plaintiff confined his claim of negligence of defendants to the following:

> "* * * and due to the negligence of the defendant Commerce and that Charles Darcy or some other employee of the defendant negligently slammed the door shut while the plaintiff's thumb was in it."

The pretrial memorandum of plaintiff stated that "Plaintiff is not relying on the doctrine of *res ipsa loquitur*." He also declared: "Plaintiff may call Charles Darcy or any other member of the crew having knowledge of the facts."

On this verdict, the jury held defendants liable for negligence, but not liable for unseaworthiness, and determined that defendants had not shown plaintiff guilty of contributory negligence.

At the end of plaintiff's case on liability and at the end of the trial of that issue, defendants again moved (1) to dismiss the action for lack of proof of negligence; and (2) for a directed verdict for defendants. By reason of the jury's verdict against plaintiff on unseaworthiness, defendants did not renew the motion as to that factor.

The court reserved decision on the motion in respect to negligence and on the motion for a directed verdict.

The court then tried the issue as to damages to the jury, which returned a verdict for plaintiff in the sum of $12,000.[1] The defendants renewed the motions for dismissal and judgment N.O.V. with respect to negligence. Between the trial of liability and the trial of damages under the Jones Act, the parties agreed to a judgment of $2,000 in favor of plaintiff to cover plaintiff's other claims: (1) Wages (other than overtime) to the time of termination of the voyage; and (2) Maintenance and cure.

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[1] Copy of Special Verdict is hereto attached.

Pending determination of the present motion, entry of judgment has been stayed.

Upon a motion for a directed verdict, defendants admit every fact in evidence which tends to sustain plaintiff's case and every inference reasonably inferable therefrom. *Hellweg v. Chesapeake & Potomac Telephone Co.*, 110 F. 2d 546 (D.C. Cir. 1940); *Worcester, et al., v. Pure Torpedo Co.*, 140 F. 2d 358 (7th Cir. 1944).

The proof itself, as far as it goes, is not disputed. For the purpose of this motion the facts are as follows:

Plaintiff, Armstrong, started to go to sea in 1951 and served as deck hand. On April 19, 1967, plaintiff joined defendant's ship, the SS Thalia, at Singapore between 7:00 and 8:00 P. M. and was assigned by the Chief Mate to the 12 to 4:00 A. M. watch (SM 3-4).

That night he worked as a gangway security watch from 12 midnight to 4:00 A. M., when he went to the mess hall, had a sandwich, and went below, where he slept until 5:45 (4-5). Then he assisted in taking in some stern lines to effect a change in anchorage until about 8:00 A. M. (6).

After washing up in his forecastle, he went to visit a friend, one Charles Darcy, in a room on the port side of the ship (7). There he found Darcy, a "white haired wiper," and a machinist holding a "discussion" which continued about 30 minutes, during which time the wiper talked about being a pilot. Plaintiff sat on the edge of the bunk with the door which opened inward on his left (8-9).

Although the wiper had never flown a plane, he said he wanted to be a pilot, whereupon plaintiff suggested, "Well, why don't you do it," whereupon the wiper "got mad" and plaintiff rose to leave (9-10).

The critical episode then followed. Armstrong got up, spoke to Darcy, and turned towards the door to leave. Darcy came over to plaintiff, put his hand on

plaintiff's shoulder, and said, "Yes, you better go" (10). It must be noted here that there was no testimony that Darcy pushed or propelled plaintiff. The door opened inward.

Plaintiff continued, "I was stepping towards the door" (11). "The door was open" (50). "I lost my balance. I reached out to steady myself. I grabbed the door jamb. My thumb was in line with the door. Then the door was swung closed with force on my thumb" (11). As plaintiff said, "The door slammed" but he saw nobody touch the door (53).

At that time the condition of the sea was "slight swells," but plaintiff said the door had not moved. The machinist had left and only plaintiff, Darcy and the wiper were in the room (11).

Although the door was not equipped with a door check (12), plaintiff said this door was the same "as any other door going into any other man's living quarters," and the same kind of door as on other ships (26).

The door worked, was not broken, was "Okay" when Armstrong opened it (26). When he lost his balance, he said he started to fall from one side to the other and reached up with his left hand and grabbed the door jamb on the side where the hinges were (30), with his thumb in the door jamb (53).

Plaintiff denied touching the door itself and *denied seeing anyone touch the door at that time* (30, 31).

At the court's request, plaintiff re-enacted the accident through a demonstration at a similar door opening into the court room (49-53).

Plaintiff said neither Darcy nor the wiper was near the door. *Plaintiff could not explain how the door moved nor why it moved* (53). At the time plaintiff started to lose his balance, Darcy was at his left (54). The door

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There was no evidence as to whether plaintiff was right or left-handed.

was at plaintiff's right. Neither Darey nor the wiper was called to testify and no explanation as to their whereabouts or present employment was supplied.

Thus, in brief, we have a stumble or a loss of balance by the plaintiff which resulted in the placing of his left thumb upon the door jamb a little above his head, and a mysterious closing of the door, unexplained as to cause by plaintiff or any one else.

The question, of course, is this: Has plaintiff shown any negligence on the part of defendants?

Although there is no evidence that either Darey or the wiper was closing the door, and, in fact, plaintiff's own evidence is to the contrary, plaintiff seems to claim that there is some inference, however it may be derived, that either Darey or the wiper did something to the door. This, of course, is speculation. In any event, even if we assume that it had occurred, this fact alone does not warrant any conclusion, absent knowledge or observation that plaintiff had his thumb in the jamb, of any negligence on the part of Darey or the wiper. Darey or the wiper would have to have closed the door with knowledge of plaintiff's vulnerability, or would have to have acted unreasonably recklessly. No such evidence was presented.

I.

PROPRIETY OF A DIRECTED VERDICT

"A directed verdict (or peremptory instruction) is proper when the evidence is without conflict and is such that all reasonable men must agree on one conclusion, or where the evidence is insufficient to sustain a verdict for the party against whom the motion is directed." 65A. C.J.S. Negligence 251(6), p. 792; *Pickering v. Corson*, 108 F. 2d 546 (7th Cir. 1940); *Hemphill v. Mississippi Power Co.*, 84 F. 2d 971 (5th Cir. 1936).

II.

Burden of Proof.

In a personal injury suit the burden of proving defendant's negligence is on plaintiff. In *Martin v. United States*, 225 F. 2d 945, 948 (D.C. Cir. 1955), C.J. Miller stated:

> "* * * We said in *F.W. Woolworth Co. v. Williams*, *supra*, 59 App. D.C. at page 348, 41 F. 2d at page 971:
>
> "'The burden of proving defendant's negligence is upon the plaintiff. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant. * * *'"

See also *Harshbarger v. Associated Transport, Inc.*, 282 F. 2d 179, 184 (2nd Cir. 1960) and cases cited on p. 184.

The plaintiff has the burden of proving by a preponderance of the evidence that he was injured by defendants' negligence. "The injury must be traced to a specific instrumentality or cause for which the defendant was responsible or it must be shown that defendant was responsible for all reasonably probable causes to which the accident could be attributed." Law of Torts, Prosser, pp. 222, 223; *Manley v. New York Tel. Co.*, 303 N. Y. 18 (1951).

As to the proof of causation, Prosser writes as follows:

> "On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of

> proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. * * *" Prosser on Torts (3rd ed.), p. 245.

III.

UNDER THE JONES ACT THE PLAINTIFF WAS REQUIRED TO OFFER MORE THAN A MERE SCINTILLA OF EVIDENCE.

Federal courts have held that "a mere scintilla of evidence is not enough to require the submission of an issue to the jury." *DeZon v. American Presidential Lines, Ltd.*, 129 F. 2d 404, 407 (9th Cir. 1942) (a Jones Act case), aff'd 318 U. S. 660 (1943).

In *DeZon, supra*, the Ninth Circuit Court of Appeals, citing *Cortes v. Baltimore Insular Line*, 287 U. S. 367 (1932) wrote:

> "* * * although the Jones Act has given 'a cause of action to the seaman who has suffered personal injury through the negligence of his employer' (287 U. S. 372, 53 S. Ct. 174, 77 L. Ed. 368), still it does not make that negligence which was not negligence before, does not make the employer responsible for acts or things which do not constitute a breach of duty. * * *" 129 F. 2d at 407-408.

See *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957) (an FELA case) and *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521 (1957), which made the doctrines of

DeZon and *Rogers* applicable to Jones Act cases. See also *Hanley v. Alaska Steamship Co.*, 236 F. 2d 307 (9th Cir. 1956).

In the present case proof of negligence is wholly lacking.

IV.

Choice of Probabilities

"Evidence which presents no more than a choice of probabilities is not deemed substantial enough to warrant submission of a case to the jury. Liability cannot be predicated upon mere conjecture or speculation as to the proximate cause of damage." *Dayton Veneer & L. Mills v. Cincinnati, N. O. & T. P. Ry. Co.*, 132 F. 2d 222, 223 (6th Cir. 1942) and cases cited therein. See also *Atchison, Topeka & Santa Fe Ry. Co. v. Hamilton Bros.*, 192 F. 2d 817, 821 (8th Cir. 1951); *Coffman v. Southern Coal Co.*, 52 F. Supp. 351, 354 (W. D. Arkansas 1943).

V.

Surmise, Conjecture and Speculation

"It is a fundamental rule of law that the burden is upon the one asserting negligence to prove it by a preponderance of the evidence, and such burden is not sustained by evidence that is surmise, speculation or conjecture." *Martin K. Eby Construction Co. v. Neely*, 344 F. 2d 482, 485 (10th Cir. 1965), aff'd 386 U. S. 317 (1967), rehearing den. 386 U. S. 1027 (1967), and cases therein cited. See *Waters v. National Life & Accident Ins. Co.*, 156 F. 2d 470 (10th Cir. 1946); *United States v. Carroll*, 212 F. Supp. 422, 432 (W. D. Arkansas 1962); *Penna. R. Co. v. Chamberlain*, 288 U. S. 333 (1933).

The Third Circuit in *Haldeman v. Bell Telephone Company of Pennsylvania*, 387 F. 2d 557 (3rd Cir. 1967), stated:

> "It is axiomatic that in the trial of a case like this plaintiffs
>
> "'* * * must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.' (Restatement (Second), Torts, 433B, Comment a at 442 (1965)." 387 F. 2d at 559.

The presentation of weaker and less satisfactory testimony when higher evidence could have been produced in itself may awaken suspicion. *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F. 2d 480, 485 (2nd Cir. 1962).

No inference could be drawn against the defendants at the trial of this case; correspondingly, no presumptions favor plaintiff at trial. As stated by the Second Circuit, Chase, C. J.:

> "A defendant, if so advised may well let the case go to the jury on the weakness of the evidence presented by a plaintiff, who has the burden of proof without being called to task for failure to call certain witnesses, or have any adverse inference drawn which would not follow from an entire failure to refute the evidence introduced. In this regard a party who introduces no evidence, and has witnesses exclusively within its control stands the same as a party who introduces no evidence and has no witnesses." *Robbins Dry Dock v. Navigazione Libera*, 32 F. 2d 209, 210-211 (2nd Cir. 1929).

Plaintiff argues that the entire defense was "predicated upon the theory that plaintiff's accident was caused or contributed to by his intoxication." (Plaintiff's brief, p. 5) Plaintiff erroneously neglects to consider the basic principle here that he is bound to show negligence upon the part of defendant and that such negligence was the proximate cause of plaintiff's injury. This proof of negligence *must be shown before* any consideration of contributory negligence becomes relevant. And certainly a proof of plaintiff's freedom from contributory negligence does not itself establish defendants' negligence. See *Calvert v. Kuta Taxi, Inc., et al.*, decided June 26, 1969, Second Circuit Court of Appeals, Docket No. 32889, p. 2593.

VI.

Proximate Cause as a Question of Law

"Proximate cause is ordinarily a question of fact for the jury, but where the facts are undisputed, it becomes a question of law for the Court." *Martin K. Eby Construction Co. v. Neely*, 344 F. 2d 484, 486 (10th Cir. 1965), aff'd. 386 U. S. 317 (1967), rehearing den. 386 U. S. 1027 (1967).

The circumstances of the case may be such as to make the question of negligence one of law for the court.

VII.

Res Ipsa Loquitur

The rule of *res ipsa loquitur* may be invoked only when, under the circumstances involved, direct evidence is absent and unavailable. 64A. C. J. S. Negligence §220.8, notes 58 and 60; pp. 543, 544; *Stiles v. Gore*, 345 F. 2d 991 (9th Cir. 1965); *Gray v. Baltimore & O. R. Co.*, 24 F. 2d 671 (7th Cir. 1928); *Dindo v. Grand Union Co.*, 331

F. 2d 138 (2nd Cir. 1964); *Hall v. National Supply Co.*, 270 F. 2d 379 (5th Cir. 1959).

The doctrine of *res ipsa loquitur* is not applicable here.

VIII.

The Absent Witnesses

Two witnesses, Darcy and the wiper, who might have provided answers to mere speculative surmises, were not called. No explanations were given by anyone as to whether they were still employed or under the control of the defendants. Darcy was a friend of plaintiff (SM 7). Both Darcy and the wiper apparently were union members.

Wigmore states that "The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause." II Wigmore on Evidence, p. 162.

Wigmore cites numerous precedents which sustain this principle (p. 162, fn). Among these are the following: *United States v. Schindler*, 10 Fed. 547 (1880) (omission to call a witness who, as the evidence showed, was fully able to confirm testimony of defendant); The Fred M. Laurence, 15 Fed. 635 (1883) (failure to call a seaman on board at the time of a collision who knew whether the Laurence was the boat which did the damage); The Joseph B. Thomas, 81 Fed. 578 (1897) (failure to call as witness employees who, as shown by other evidence, may probably have committed an act of negligence resulting in the injury complained of).

Wigmore further comments:

> "It is commonly said that no inference is allowable where the person in question is *equally available* to both parties; particularly where he is actually in court; though there seems to be no dis-

position to accept such a limitation absolutely or to enforce it strictly. Yet the more logical view is that the failure to produce is *open* to an inference *against both parties*, the particular strength of the inference against either depending on the circumstances. * * *" [footnotes omitted] Wigmore on Evidence, Vol. II (3rd ed.), pp. 169-171.

See also cases cited by Wigmore in note 4, p. 171.

McCormick comments as follows:

"* * * it seems that equality of favor is nearly always debatable, and that though the judge thinks the witness would be as likely to favor one party as the other, he should permit either party to argue the inference against the adversary. [footnote omitted] At least, it would appear in this supposed case of 'equal favor,' if the witness's knowledge is directed toward a particular issue, that then the argument should be available against the party who has the burden of persuasion on that issue." McCormick on Evidence, p. 534.

Consequently, it would be fair to state that at least at the time of trial the jury would have been entitled to draw an inference against the plaintiff due to plaintiff's failure to call Darcy or the wiper, since plaintiff had the burden of proof as to defendants' negligence. However, it is necessary at the present time to draw all inferences in favor of the plaintiff, for purposes of determining defendant's motion for judgment N.O.V. Nevertheless, no inference in this regard may be drawn against the defendants at the present time.

IX.

Defendants' Motion to Set Aside Damages Verdict as Excessive

Defendants claim that the verdict of $4,000 for past loss of wages (Item 3[b]) is inconsistent with the verdict

of no damages for future loss of wages (Item 4 [a]). See Special Verdict attached hereto. This contention seems to be based upon the theory that, if plaintiff could in the future work at his trade or at other labor without loss, that, therefore, he could have done so in the period between injury and trial. However, this argument is not convincing and I, therefore, deny defendants' motion as to the damage verdict.

Conclusion

Accordingly, I find that plaintiff has not proved negligence on the part of the defendants. I find this to be so taking every inference in favor of the plaintiff.

Defendants' motion for judgment N. O. V. is granted. Therefore, the jury determinations both as to negligence and as to damages are set aside as contrary to the clear weight of the evidence and the Clerk of the Court is directed to enter judgment for defendants on the present case.

Defendants' motion to set aside the verdict of the jury for excessive damages is denied. Plaintiff's motion to set aside the verdict of the jury for inadequate damages is withdrawn.

However, I direct entry of judgment for plaintiff pursuant to stipulation of counsel in the amount of $2,000 in satisfaction of the claim for wages, maintenance and cure.

I direct taxation of costs and judgment for costs in favor of defendants on the Jones Act case. However, I direct that no costs be taxed or entered in favor of either party on the wages, maintenance and cure case since costs were not contemplated by the stipulation of counsel.

So ordered.

Dated: New York, N. Y.
July 11, 1969.

RICHARD H. LEVET
United States District Judge

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 555—September Term, 1969.

(Argued February 25, 1970 Decided March 20, 1970.)

Docket No. 33852

ERNEST A. ARMSTRONG,

Plaintiff-Appellant,

v.

COMMERCE TANKERS CORP. and EMPIRE SHIP AGENTS & BROKERS CORP.,

Defendants-Appellees.

Before:

LUMBARD, Chief Judge, ANDERSON, Circuit Judge, and CROAKE, District Judge.

Appeal from judgment n.o.v. in favor of the defendant, shipowner and its agent, for plaintiff's failure to show negligence on claim under the Jones Act, following special verdict in favor of plaintiff on that issue but in favor of the defendant on the issue of seaworthiness. Affirmed.

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*Of the Southern District of New York, sitting by designation.

John F. X. McKiernan, Esq., New York, N. Y. (Paul C. Matthews, Esq., and George J. Engelman, Esq., New York, N. Y., on the brief), for Plaintiff-Appellant.

Robert S. Blanc, Jr., Esq., New York, N. Y. (Hill, Betts, Yamaoka, Freehill & Longcope and Robert C. Buff, Esq., New York, N. Y., on the brief), for Defendants-Appellees.

ANDERSON, Circuit Judge:

The plaintiff, Ernest A. Armstrong, newly signed on as a seaman aboard defendant's vessel, *SS Thalia*, went off duty at 0800 April 20, 1967, while the ship was anchored in Singapore harbor. On invitation he went to the quarters of a shipmate, named Darcy, and sat on a bunk to the right of the open door. In the quarters at the time were Darcy, a white-haired wiper, and a machinist, also crew members. A general conversation ensued. The machinist left, and the three remaining talked about learning to pilot an airplane. The white-haired wiper took offense at something said by Armstrong, and the plaintiff got up to leave. Darcy put his hand on Armstrong's shoulder and said, "Yes, you had better go." The door, which swung into the cabin, was wide open. As Darcy put his hand on Armstrong's shoulder, the latter, who was headed for the doorway and two to two and a half feet away from it, lost his balance and reached out for support. Though the door jamb was on his right, he apparently reached over his head with his left hand and grasped the door jamb in such a way that his left thumb was between the hinged edge of the door and the doorframe. While he was so situated he claims the door slammed shut on his thumb "with force" and produced a compound fracture. At that time Darcy was about two feet behind and to the left of Armstrong. The plaintiff did not know in what part of the quarters the white-haired wiper was, but plaintiff testified he did not hit the door himself nor did he see anyone else near the door because, he said, he

was facing the other way. There were slight swells in Singapore harbor at the time, but the plaintiff said they did not move the ship. He could not explain how or why the door moved.

The plaintiff at the trial had expressly disclaimed any reliance upon the theory of *res ipsa loquitur*. He did not call Darcy or anyone else who had been present at the time the incident occurred, as witnesses, but relied on his own testimony alone. The defendants rested at the end of the plaintiff's case and moved for a directed verdict on which the court deferred decision.

The jury returned a special verdict finding that (1) the negligence of one of defendants-appellees' employees was the proximate cause of Armstrong's injury; (2) there was no unseaworthiness; and (3) Armstrong was not contributorily negligent. It awarded the plaintiff $12,000 in damages.

The defendants-appellees moved for judgment n.o.v., and the trial court granted the motion on the ground that proof of negligence was wholly lacking. The sole issue on appeal is whether or not there was sufficient evidence from which the jury could reasonably infer that one of Armstrong's fellow crew members slammed the door shut on his thumb.

The only testimony in the case was that of the plaintiff. A little over half of it was taken up with cross-examination and some re-direct on the question of plaintiff's use of alcoholic beverages and the history of his recurrent drinking problems. The court fully charged on the matter of intoxication and its relationship to contributory negligence. The jury specifically found there was none. This appears to have been the principal point of conflict in the trial court; and the interrogation relative to the persons and circumstances just prior to and subsequent to the fracturing of Armstrong's left thumb are, particularly from the purview of a reviewing court, unclear and unsatisfactory. No plan or drawing showing either the size and shape of Darcy's quarters or the location of the door and the fur-

nishings was put in evidence. There was not even a rough sketch by the witness to illustrate his testimony. Other than stating that Darey was about two feet behind and slightly to the left of him when he lost his balance, Armstrong did not testify where in the cabin the other crewmen were, or where the white-haired wiper was, or what he was doing the last time Armstrong observed him. There was no evidence of any act performed or committed by either Darey (except placing his hand on Armstrong's shoulder, as noted) or by the white-haired wiper. Consequently, there was no fact shown from which an act of negligence could be inferred. There was no testimony specifying when Armstrong crossed the raised threshold and went outside the cabin before his injury, if, indeed, he did so. There was no testimony what was said or done by anyone immediately after Armstrong's thumb was fractured.

To attempt some clarification of the situation up to and including the point of the injury, the trial judge asked the plaintiff to use an area around an inward opening door in the courtroom to demonstrate what happened through a reenactment of his movements and the positions and actions of others. The interrogation was participated in by the court, and by counsel for both parties. As frequently occurs, counsel for the plaintiff did not take care to make certain that the reported testimony clearly and fully described for the record the movements, gestures, locations, references, etc., used or indicated in the demonstration so, with a few exceptions, the meaning of it was lost on appeal. For example: the plaintiff was asked about the location of the bunk in relation to the door; his answer was, "The bunk would be back about here." This court was given no information as to the location of "here," nor did the record disclose the distance between or the relative positions in the room of the bunk and the door.

The appellant's claim rests upon the proposition that when he was hauled out of the cabin he left his shipmates, Darcy and the white-haired wiper, in the room behind him, that his left thumb was fractured in the closing door and that the jury was entitled to draw the inference that his injury was proximately caused by some negligent act on the party of either or both of them.

There was, however, no evidence of any act, negligent, or otherwise, committed by either of them which related to the injury, and the trial judge properly granted the motion to set aside the verdict in favor of the plaintiff and entered judgment n.o.v. for the defendants. Whether the motion is one to direct a verdict or to set aside a verdict which the jury has returned, the test applied by the court is the same. The evidence must be viewed in the light most favorable to the party other than the movant. The motion will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him. 5 J. Moore, *Federal Practice*, ¶50.02[1] (2d ed.); F. James, *Civil Procedure* §7.11, pp. 277-278 (1965).

In the present case the first aspect of this test is applicable, since there was no evidence to support an inference that Darcy or the white-haired wiper committed an act which resulted in plaintiff's injury. There was no evidence that either was near the door or took or could have taken any action with respect to it.

Although, as this Circuit has emphasized before, a jury's verdict is not lightly to be set aside, it is apparent that the jury's finding that some act of negligence was performed by the plaintiff's shipmates was sheer surmise and conjecture. See *Fleet Messenger Service v. Life Ins. Co. of North America*, 315 F. 2d 593, 598 (2 Cir. 1963); *O'Connor v. Pennsylvania R.R. Co.*, 308 F. 2d 911 (2 Cir. 1962).

The judgment of the district court is affirmed.

Judgment Appealed From.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March one thousand nine hundred and seventy.

Present:

Hon. J. Edward Lumbard, Chief Judge
Hon. Robert P. Anderson, Circuit Judge
Hon. Thomas F. Croake, District Judge

ERNEST A. ARMSTRONG,

Plaintiff-Appellant

v.

COMMERCE TANKERS CORP. and EMPIRE SHIP AGENTS & BROKERS CORP.,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

A true copy.

A. DANIEL FUSARO
Clerk

(Seal)

Order Extending Time.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1969

ERNEST A. ARMSTRONG,

Petitioner,

v.

COMMERCE TANKERS CORP. and EMPIRE SHIP AGENTS & BROKERS CORP.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 17th, 1970.

Dated this 27th
day of May, 1970.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States